

COBLENTZ, PATCH, DUFFY & BASS LLP  
ONE FERRY BUILDING, SUITE 200, SAN FRANCISCO, CALIFORNIA 94111-4213  
415.391.4800 • FAX 415.989.1663

1 CLIFFORD E. YIN (State Bar No. 173159)  
ZUZANA S. IKELS (State Bar No. 208671)  
2 COBLENTZ, PATCH, DUFFY & BASS LLP  
One Ferry Building, Suite 200  
3 San Francisco, California 94111-4213  
Telephone: 415.391.4800  
4 Facsimile: 415.989.1663  
Email: ef-cey@cpdb.com,  
5 ef-zsi@cpdb.com

6 Attorneys for Defendants  
SafeDesk Solutions, Inc. and Phil Autrey

7  
8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

10  
11 DATA CAPITAL CORPORATION, a  
California Corporation,

12 Plaintiff,

13 v.

14 SAFEDesk SOLUTIONS, INC., an Oregon  
15 Corporation; PHIL AUTREY, an individual;  
DOES 1 through 25, inclusive,

16 Defendants.  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Case No. C 08-00678 JW (HRL)

**DEFENDANTS' NOTICE OF MOTION  
AND MOTION TO DISMISS THE FIRST  
AMENDED COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES AND DECLARATION OF  
ZUZANA S. IKELS IN SUPPORT  
THEREOF**

**[F.R.C.P. 12(b)(1) and (6)]**

Date: June 30, 2008  
Time: 9:00 a.m.  
Courtroom: 8, Fourth Floor  
Judge: Hon. James Ware

**NOTICE OF MOTION AND MOTION**

TO PLAINTIFF DATA CAPITAL CORPORATION AND TO ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on June 30, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled Court, located at 280 South 1st Street, San Jose, CA 95113, Courtroom 8, on the fourth floor, before the Honorable James Ware, defendants SafeDesk Solutions, Inc. and Phil Autrey (collectively "defendants") move this Court to dismiss the First Amended Complaint because this action does not present an actual case or controversy, and for failure to state a claim upon which relief can be granted; pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

The Court should dismiss this action because the sole, remaining claim in the action, for declaratory relief, does not present an actual case or controversy. This Motion will be based on this Notice of Motion, Motion and Memorandum in Support, the Declaration of Zuzana S. Ikels, the pleadings and papers on file herein, and such other and further argument as may be presented at the hearing on this Motion.

COBLENTZ, PATCH, DUFFY & BASS LLP  
ONE FERRY BUILDING, SUITE 200, SAN FRANCISCO, CALIFORNIA 94111-4213  
415.391.4800 • FAX 415.989.1663

COBLENTZ, PATCH, DUFFY & BASS LLP  
 ONE FERRY BUILDING, SUITE 200, SAN FRANCISCO, CALIFORNIA 94111-4213  
 415.391.4800 • FAX 415.989.1663

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
STATEMENT OF THE ISSUE PRESENTED .....	1
THE FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY .....	1
ARGUMENT .....	2
I.    STANDARD OF REVIEW. ....	2
II.   THE COMPLAINT SHOULD BE DISMISSED ON THE GROUNDS THAT THERE IS NO PRESENT CASE OR CONTROVERSY. ....	3
A.    The Declaratory Relief Act. ....	4
B.    Plaintiff's Claim Is Moot. ....	5
C.    The Declaratory Relief Claim Fails The Ripeness Doctrine. ....	6
D.    The Court Should Abstain From Exercising Its Jurisdiction Over This Matter. ....	8
CONCLUSION .....	9

**TABLE OF AUTHORITIES****Page****CASES**

<i>Aetna Life Ins. Co. v. Haworth</i> , 300 U.S. 227 (1937) .....	3
<i>Allstate Ins. Co. v. Smith</i> , 929 F.2d 447 (9th Cir. 1991) .....	7
<i>American States Ins. Co. v. Kearns</i> , 15 F.3d 142 (9th Cir. 1994) .....	3, 4
<i>Augustine v. United States</i> , 704 F.2d 1074 (9th Cir. 1983) .....	3
<i>Biodiversity Legal Foundation v. Badgley</i> , 309 F.3d 1166 (9th Cir. 2002) .....	5
<i>Brillhart v. Excess Insurance Co.</i> , 316 U.S. 491 (1942) .....	8
<i>Calderon v. Ashmus</i> , 523 U.S. 740 (1998) .....	7
<i>City of Erie v. Pap's A.M.</i> , 529 U.S. 277 (2000) .....	4
<i>Clinton v. Acequia, Inc.</i> , 94 F.3d 568 (9th Cir. 1996) .....	4
<i>Culinary Workers Union, Local 226 v. Del Papa</i> , 200 F.3d 614 (9th Cir. 1999) .....	5
<i>Digital Envoy, Inc. v. Google, Inc.</i> , 2006 U.S. Dist. LEXIS 24865 (N.D. Cal. March 28, 2006) .....	6, 8
<i>Doe v. Gallinot</i> , 657 F.2d 1017 (9th Cir. 1981) .....	8
<i>Gasperini v. Center for Humanities</i> , 518 U.S. 415 (1996) .....	7
<i>Gladwell Governmental Servs. v. County of Marin</i> , 2005 U.S. Dist. LEXIS 42276, *4-5 (N.D. Cal October 15, 2005) .....	7
<i>Government Employees Ins. Co. v. Dizol</i> , 133 F.3d 1220 (9th Cir. 1998) ( <i>en banc</i> ) .....	8

1	<i>Lee v. State of Oregon,</i>	
2	107 F.3d 1382 (9th Cir. 1997).....	5
3	<i>Levin Metals Corp. v. Parr-Richmond Terminal Co.,</i>	
4	799 F.2d 1312 (9th Cir. 1986).....	4
5	<i>Lujan v. Defenders of Wildlife,</i>	
6	504 U.S. 555 (1992).....	4
7	<i>Maguire v. Hibernia Sav. &amp; Loan Soc.,</i>	
8	23 Cal.2d 719 (1944).....	7
9	<i>Mechling Barge Lines v. United States,</i>	
10	368 U.S. 324 (1961).....	8
11	<i>Mortensen v. First Fed. Sav. &amp; Loan Ass'n,</i>	
12	549 F.2d 884 (3d Cir. 1977).....	3
13	<i>National Audubon Society, Inc. v. Davis,</i>	
14	307 F.3d 835 (9th Cir. 2002).....	6
15	<i>Paramount Pictures Corp. v. RePlayTV,</i>	
16	298 F.Supp.2d 921 (2004).....	7
17	<i>Principal Life Ins. Co. v. Robinson,</i>	
18	394 F.3d 665 (9th Cir. 2005).....	3
19	<i>Ross v. Alaska,</i>	
20	189 F.3d 1107 (9th Cir. 1999).....	5
21	<i>Seattle Audubon Soc'y v. Moseley,</i>	
22	80 F.3d 1401 (9th Cir. 1996).....	5
23	<i>Smilecare Dental Group v. Delta Dental Plan,</i>	
24	88 F.3d 780 (9th Cir. 1996), <i>cert. denied</i> , 519 U.S. 1028 (1996).....	3
25	<i>Societe de Conditionnement en Aluminium v. Hunter Engineering Co.,</i>	
26	655 F.2d 938 (9th Cir. 1981).....	7
27	<i>Sutliff, Inc. v. Donovan Cos.,</i>	
28	727 F.2d 648 (7th Cir. 1984).....	3
	<i>Thornhill Publ'g Co., Inc. v. General Tel. &amp; Elec. Corp.,</i>	
	594 F.2d 730 (9th Cir. 1979).....	3
	<i>United Food &amp; Commercial Workers Local Union Numbers 137, 324, 770, 899, 905, 1167,</i>	
	<i>1222, 1428, and 1442 v. Food Employers Council, Inc.,</i>	
	827 F.2d 519 (9th Cir. 1987).....	4
	<i>West v. Secretary of the DOT,</i>	
	206 F.3d 920 (9th Cir. 2000).....	7
	<i>Western Mining Council v. Watt,</i>	
	643 F.2d 618 (9th Cir. 1981).....	3

1	<i>Wilton v. Seven Falls Co.</i> ,	
2	515 U.S. 277 (1995) .....	8

**STATUTES**

4	28 U.S. Code Section 2201 .....	4
5	Federal Rule of Civil Procedure 12(b) .....	1, 2, 3, 8

**OTHER AUTHORITIES**

8	10A C. Wright, A. Miller, and M. Kane,	
9	Federal Practice and Procedure § 2751,	
10	at 569-71 (2d ed. 1983) .....	4

COBLENTZ, PATCH, DUFFY & BASS LLP  
 ONE FERRY BUILDING, SUITE 200, SAN FRANCISCO, CALIFORNIA 94111-4213  
 415.391.4800 • FAX 415.989.1663

1                                    **STATEMENT OF THE ISSUE PRESENTED**

2            Defendants previously moved to dismiss the original complaint, and each of the six causes  
3 of action, because it was bereft of even one charging allegation that gave rise to a legally  
4 cognizable claim. In lieu of opposing that motion, plaintiff filed a First Amended Complaint  
5 ("Complaint") deleting all but one of the causes of action and most of the allegations. The sole  
6 remaining claim, for declaratory relief, is not based upon any facts, but rather an undeveloped  
7 conclusion with no allegations of damage or injury to plaintiff. As such, there is no actual or  
8 present controversy between the parties necessitating declaratory relief from the Court. The  
9 castaway claim cannot survive the shipwreck. This action should be dismissed with prejudice.

10                                  **THE FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY**

11            Although defendants deny the allegations of the Complaint, for purposes of this motion,  
12 they will assume them to be true.

13            The amended pleading alleges the following. Plaintiff Data Capital Corporation ("Data  
14 Capital") describes itself as a provider of "IT management solutions and services for large  
15 government and telecommunications companies." Complaint, ¶ 5. Defendant SafeDesk Solutions  
16 Inc. and its president, defendant Phil Autrey, are in the business of, among other things,  
17 developing software. *Id.* (Defendants are collectively referred to as "SafeDesk.") In 2007, Data  
18 Capital approached defendants seeking to acquire all of their intellectual property. On or about  
19 June 8, 2007, the parties entered into the IP Asset Sale and Purchase Agreement (the "IP  
20 Agreement") (Complaint, ¶ 6), which is attached as Exhibit 1 to the Complaint.

21            Plaintiff alleges that SafeDesk transferred all of its intellectual property ("IP") to plaintiff  
22 under the IP Agreement. *Id.*, ¶ 6. The original complaint contended that SafeDesk forfeited all  
23 rights to use or profit from the intellectual property as a result of the transfer and, therefore,  
24 SafeDesk had no rights to exploit its intellectual property. *See* Zuzana S. Ikels Declaration in  
25 Support, Exhibit A (Original Complaint), at ¶¶ 11, 14. Plaintiff also alleged, and continues to  
26 allege, that defendants have asserted they are entitled to rescission of the IP Agreement. The  
27 Complaint does not explain what this conclusory statement is based upon, or why they disagree In  
28 its original pleading, plaintiff conjectured that, because defendants alleged that the IP Agreement

1 was rescinded, SafeDesk *might* attempt to "usurp" business with a third party (British  
2 Telecommunications) that the parties were jointly pursuing. Exh. A at ¶¶ 7, 8, 9, 21, 26.

3 In our first motion to dismiss, defendants pointed out that the IP Agreement (which is  
4 attached as Exhibit 1 to the original complaint) contradicted the allegations and claims in  
5 plaintiff's pleading in that the contract explicitly required defendants to continue to develop, use  
6 and profit from the IP. *See* Ikels Decl., Exh. A (original complaint), Exh. 1 (the IP Agreement) at  
7 Articles III, VIII, and X (examples of provisions in the IP Agreement that not only allowed, but  
8 *required*, SafeDesk to continue to use, market and license its IP assets and build its business).  
9 Defendants also observed that plaintiff's claims were founded on a hypothetical — that a potential  
10 customer *might not* accept the parties' joint proposal and, potentially, that SafeDesk *might* then  
11 seek to do business with that customer separately.

12 Evidently realizing that both problems were unfixable, plaintiff deleted all these allegations  
13 and claims in its amended pleading. *See* Ikels Decl., Exh. B (redline comparison of the original  
14 complaint and amended complaint). The sole, remaining claim for declaratory relief asks the Court  
15 to rule on whether the agreement remains enforceable in light of defendants' assertion that they are  
16 entitled to rescission. (Complaint at ¶ 9.) Noticeably missing from the amended pleadings,  
17 however, is an allegation that plaintiff will suffer any current, or even future, injury or damages if  
18 the Court does not weigh in on the matter now. Plaintiff does not even bother to explain how and  
19 on what basis SafeDesk contends it is entitled to rescission or why Data Capital disputes that the  
20 agreement has been rescinded. These missing pieces reflect the underlying problem with the  
21 entire action – plaintiff is unable to articulate a present case or controversy.

## 22 ARGUMENT

### 23 I. STANDARD OF REVIEW.

24 Defendants move to dismiss this claim because the court "lacks jurisdiction over the  
25 subject matter" because there is no present case or controversy, pursuant to Rule 12(b)(1) of the  
26 Federal Rules of Civil Procedure. When considering a factual attack on subject matter  
27 jurisdiction, such as here, "the district court is ordinarily free to hear evidence regarding  
28 jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary."



1 *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publ'g Co.,*  
 2 *Inc. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)). Plaintiff bears the burden  
 3 of proving a case or controversy exists. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241  
 4 (1937). In fact, "[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence  
 5 of disputed material facts will not preclude the trial court from evaluating for itself the merits of  
 6 jurisdictional claims." *Thornhill*, 594 F.2d at 733 (quoting *Mortensen v. First Fed. Sav. & Loan*  
 7 *Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

8 Defendants also move to dismiss the claim under Rule 12(b)(6) of the Federal Rules of  
 9 Civil Procedure because it lacks the necessary factual allegations to support its claim. The Court  
 10 may dismiss a complaint as a matter of law for "(1) lack of a cognizable legal theory or  
 11 (2) insufficient facts under a cognizable legal claim." *Smilecare Dental Group v. Delta Dental*  
 12 *Plan*, 88 F.3d 780, 783 (9th Cir. 1996), *cert. denied*, 519 U.S. 1028 (1996) (citations omitted).  
 13 Although the Court must accept well-pleaded factual allegations as true for purposes of Rule  
 14 12(b)(6), it need not accept any unreasonable inferences, unwarranted deductions of fact, or  
 15 conclusory legal allegations cast in factual terms. *See Western Mining Council v. Watt*, 643 F.2d  
 16 618, 623- 624 (9th Cir. 1981). Conclusory allegations are insufficient because they provide no  
 17 information with which to determine whether the plaintiff's grievance arises under a legal theory  
 18 for which the law affords a remedy. *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir.  
 19 1984).

20 **II. THE COMPLAINT SHOULD BE DISMISSED ON THE GROUNDS THAT THERE**  
 21 **IS NO PRESENT CASE OR CONTROVERSY.**

22 Plaintiff's allegations do not give rise to an actual or present controversy. Under Article  
 23 III, section 2 of the Constitution, federal courts have subject matter jurisdiction only if they  
 24 determine there is a case or controversy between the parties. *Principal Life Ins. Co. v. Robinson*,  
 25 394 F.3d 665, 669 (9th Cir. 2005); *American States Ins. Co. v. Kearns*, 15 F.3d 142, 144 (9th Cir.  
 26 1994).

27 In order to establish that a case or controversy exists, a plaintiff must first show that it has  
 28 suffered an "'injury in fact'--an invasion of a legally protected interest which is (a) concrete and

1 particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of*  
 2 *Wildlife*, 504 U.S. 555, 560 (1992). Second, the injury must be "fairly traceable to the challenged  
 3 action of the defendant." *Id.* (internal quotation marks omitted). Third, "it must be 'likely,' as  
 4 opposed to merely 'speculative,' "that the injury is remediable by appropriate court action. *Id.*

5 The case or controversy requirement is hemmed in by several jurisdictional boundaries,  
 6 including the doctrines of mootness and ripeness. *Kearns*, 15 F.3d at 144. "A case is moot when  
 7 the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the  
 8 outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). "A case is not ripe where the  
 9 existence of the dispute itself hangs on future contingencies that may or may not occur." *Clinton*  
 10 *v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) ). Both doctrines dictate a dismissal of this  
 11 action.

#### 12 A. The Declaratory Relief Act.

13 The Declaratory Judgment Act "permits a federal court 'in a case of actual controversy  
 14 within its jurisdiction . . . [to] declare the rights and other legal relations of any interested party  
 15 seeking such declaration, whether or not further relief is or could be sought.'" *Levin Metals*  
 16 *Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986) (citing 28 U.S.C. §  
 17 2201). The Ninth Circuit has recognized that the Declaratory Judgment Act "was enacted to  
 18 afford an added remedy to one who is uncertain of his rights and who desires an early adjudication  
 19 without having to wait until he is sued by his adversary." *Id.* (citations omitted).

20 The Act "is intended to minimize the danger of avoidable loss and the unnecessary accrual  
 21 of damages and to afford one threatened with liability an early adjudication without waiting until  
 22 his adversary should see fit to begin an action after the damage has accrued .... It permits actual  
 23 controversies to be settled before they ripen into violations of law or a breach of contractual duty  
 24 and it helps avoid multiplicity of actions by affording an adequate, expedient, and inexpensive  
 25 means for declaring in one action the rights and obligations of litigants." *United Food &*  
 26 *Commercial Workers Local Union Numbers 137, 324, 770, 899, 905, 1167, 1222, 1428, and*  
 27 *1442 v. Food Employers Council, Inc.*, 827 F.2d 519, 524 (9th Cir. 1987) (citing 10A C. Wright,  
 28 A. Miller, and M. Kane, Federal Practice and Procedure § 2751, at 569-71 (2d ed. 1983)). The

1 purpose of the Act is to give litigants an early opportunity to resolve issues to avoid "the threat of  
2 impending litigation." *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1172 (9th Cir.  
3 2002) (citing *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996) (*per curiam*)).

4 Whenever a party seeks declaratory and injunctive relief, the Ninth Circuit has held that  
5 there must exist a "substantial controversy ... of sufficient immediacy and reality to warrant the  
6 issuance of a declaratory judgment." *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d  
7 614 (9th Cir. 1999) (determining a substantial controversy exists where plaintiff was threatened  
8 with criminal prosecution) (citing *Ross v. Alaska*, 189 F.3d 1107, 1114 (9th Cir. 1999)). These  
9 justiciability limitations are reflected in the doctrines of standing, mootness, and ripeness. *Id.*  
10 (citing *Lee v. State of Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997)). Thus, the determination of  
11 whether the Declaratory Judgment Act applies rests on whether there is an actual case or  
12 controversy before the Court which satisfies the jurisdictional requirements. Here, to ask the  
13 question is to answer it — the amended pleadings, which did away with all of plaintiff's claims for  
14 damages against defendants, indicates that there is no present case or controversy that supports  
15 claim.

16 **B. Plaintiff's Claim Is Moot.**

17 The purported "controversy" in plaintiff's original complaint was whether defendants were  
18 allowed to: (1) use the SafeDesk IP, and, if they do, whether they are entitled to (2) "benefit" from  
19 that use, and (3) potentially "benefit" from any business relationship with potential customers.  
20 Exhibit 1 (original complaint), ¶ 11. Defendants pointed out in their previous motion to dismiss  
21 that the IP Agreement, which was attached as the first exhibit to the original complaint, resolved  
22 each of these questions in their favor. Defendants also argued that these allegations did not allege  
23 a "present" or ripe controversy because they were based on hypothetical, future events. *Cf.*  
24 Exhibit 1 at ¶ 11 to Exh. 1, Art. III, ¶ 3, Art. X, ¶ 1.

25 Not only did plaintiff abandon these allegations in its amended pleading, it did not replace  
26 them. Plaintiff no longer alleges that SafeDesk is engaging in any business that will damage or  
27 injure Data Capital. Data Capital does not even allege that it is using the intellectual property.  
28 The amended pleading merely alleges that "defendants have *asserted* that they are not bound by

1 the IP Agreement, [and] are entitled to rescind it." Complaint at ¶ 7 (emphasis added). Plaintiff  
2 also does not contend how or if it will be damaged if the agreement is rescinded. There is, in other  
3 words, no indication as to why this case matters at all.

4 In *Digital Envoy, Inc. v. Google, Inc.*, 2006 U.S. Dist. LEXIS 24865 (N.D. Cal. March 28,  
5 2006), plaintiff moved to dismiss Google's declaratory relief counterclaim. In prior summary  
6 judgment motions, the *Digital Envoy* court had dismissed virtually all of plaintiff's patent claims  
7 and ruled that it could not recover any damages against Google. Nevertheless, Google pressed its  
8 claim and sought a declaration from the court that it had not breached the IP license agreement  
9 between it and plaintiff. The court granted Digital Envoy's motion to dismiss reasoning that,  
10 because the claims against Google had been "foreclosed" and Digital Envoy was no longer entitled  
11 to any damages, "there is no claim against which [Google] needs protection." *Digital Envoy*, 2006  
12 U.S. Dist. LEXIS 24865, \*7. Accordingly, the Court held, the matter was moot as Google had  
13 "nothing to gain at this juncture beyond a moral victory . . . [which] simply does not matter." *Id.*,  
14 at \*9.

15 This declaratory relief claim here is moot for analogous reasons. By virtue of its dismissal  
16 of all its claims for damages, plaintiff has conceded there is no justiciable controversy between the  
17 parties that merits this Court's continued involvement. Plaintiff's previous worries -- that  
18 SafeDesk *might* enter into another business agreement that *might* harm plaintiff -- have proven to  
19 be unfounded or no longer exist. It does not identify any new concerns, nor does it allege that it  
20 will suffer damages unless the agreement is deemed enforceable. Judicial review of plaintiff's  
21 claim is unwarranted.

22 **C. The Declaratory Relief Claim Fails The Ripeness Doctrine.**

23 Article III prohibits courts from rendering advisory opinions based on hypothetical facts.  
24 The only types of actions that are ripe for adjudication are where "the specific facts surrounding  
25 possible actions . . . will not aid resolution" of the challenges raised and the "injury is established,  
26 and the legal arguments are as clear as they are likely to become." *National Audubon Society,*  
27 *Inc. v. Davis*, 307 F.3d 835, 850 (9th Cir. 2002). To be a "controversy," it must be definite and  
28 concrete, touching the legal relations of the parties having adverse legal interests. *West v.*

1 *Secretary of the DOT*, 206 F.3d 920, 924 (9th Cir. 2000). It also must be a real and substantial  
 2 controversy, admitting of a *specific* relief through a decree of conclusive character, as  
 3 distinguished from an opinion advising what the law would be upon a hypothetical state of facts.  
 4 *Id.* The Ninth Circuit has held that something less than an "actual threat" of litigation is required  
 5 to meet the "case or controversy" requirement; instead, courts must focus on whether the plaintiff  
 6 has a "reasonable apprehension" that he or she will be subjected to liability or damages.  
 7 *Paramount Pictures Corp. v. RePlayTV*, 298 F.Supp.2d 921, 924 (2004) (citing *Societe de*  
 8 *Conditionnement en Aluminium v. Hunter Engineering Co.*, 655 F.2d 938, 944 (9th Cir. 1981)).

9 Even assuming the claim is not entirely moot, whatever remains does not constitute a  
 10 "reasonable apprehension" by plaintiff of damages or liability. Data Capital is asking the Court to  
 11 determine, in the abstract, whether the agreement was rescinded, if it was not, whether it is and  
 12 will be enforceable, as well as a determination of the scope of the parties' rights and  
 13 responsibilities under it. This determination will require the Court to hypothesize as to potential,  
 14 future events that have yet to happen, and may never happen, and then conjecture as to their effect.  
 15 *See Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (holding that declaratory judgment does not lie  
 16 as to validity of defense that might or might not be raised in future proceeding); *Gladwell*  
 17 *Governmental Servs. v. County of Marin*, 2005 U.S. Dist. LEXIS 42276, \*4-5 (N.D. Cal October  
 18 15, 2005) (dismissing declaratory relief claims because they were based on theoretical future  
 19 events that do not create a "present live controversy"); *see also citing Maguire v. Hibernia Sav. &*  
 20 *Loan Soc.*, 23 Cal.2d 719 (1944)).<sup>1</sup> In other words, plaintiff is impermissibly seeking an advisory  
 21 opinion from the Court.

22 Plaintiff's case is, as pled, premature and the legal arguments are not ripe for adjudication.  
 23

---

24 <sup>1</sup> For purposes of this motion to dismiss, California law applies. Because this is a diversity suit,  
 25 the Court applies the substantive law of California. *Gasparini v. Center for Humanities*, 518 U.S.  
 26 415, 427 (1996); *Allstate Ins. Co. v. Smith*, 929 F.2d 447, 449 (9th Cir. 1991). The Complaint  
 27 arises from and is based on the IP Agreement, which contains a California choice of law  
 28 provision. Exh. 1, Art. XII, ¶ 5. Defendants reserve all rights with respect to what law applies if  
 this matter moves past the pleadings stage.

1 In the absence of a present live controversy, there can be no legally cognizable interest in the  
 2 outcome of the case. The entire action should be dismissed, pursuant to both 12(b)(1) and  
 3 12(b)(6) of the Federal Rules of Civil Procedure.

4 **D. The Court Should Abstain From Exercising Its Jurisdiction Over This Matter.**

5 Even assuming there was a sufficient case or controversy, a district court is afforded a  
 6 degree of discretion to decline to exercise its jurisdiction over a declaratory relief claim. The  
 7 Supreme Court has noted, and the Ninth Circuit recognized, that "district courts possess discretion  
 8 in determining whether and when to entertain an action under the Declaratory Judgment Act, even  
 9 when the suit otherwise satisfies subject matter jurisdiction prerequisites." *Government*  
 10 *Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998) (*en banc*), quoting *Wilton v.*  
 11 *Seven Falls Co.*, 515 U.S. 277, 289 (1995); *Doe v. Gallinot*, 657 F.2d 1017, 1024-25 (9th Cir.  
 12 1981) (citing *Mechling Barge Lines v. United States*, 368 U.S. 324, 331 (1961); *Brillhart v. Excess*  
 13 *Insurance Co.*, 316 U.S. 491, 494-98 (1942).

14 In determining whether to exercise its jurisdiction, the Ninth Circuit has instructed that the  
 15 factors enumerated in *Brillhart* remain the "philosophic touchstone" for the district court. *Dizol*,  
 16 133 F.3d at 1225, citing *Brillhart*, 316 U.S. 491, 495. The factors a court may consider include  
 17 "whether the declaratory action will settle all aspects of the controversy; whether the declaratory  
 18 action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory  
 19 action is being sought merely for the purposes of procedural fencing or to obtain a 'res judicata'  
 20 advantage. . . ." *Dizol*, 133 F.3d at 1225 n.5.

21 In this case, even if plaintiff had established a basis for jurisdiction, the Court should  
 22 decline to exercise its discretion to adjudicate the declaratory relief requested. There is no useful  
 23 purpose that will be served in clarifying the parties' relations at this juncture, when there is no  
 24 actual controversy giving rise to a claim for damages. This action appears to be, at worst, for the  
 25 purpose of setting up "procedural fencing" that the Ninth Circuit warns against. *See Dizol*, 133  
 26 F.3d 1220, 1222; *see also Digital Envoy, supra*, \*12 (the court declined to exercise its jurisdiction  
 27 because "neither party, in a practical sense, needs further judicial review of its respective rights  
 28 and responsibilities under the contract at this point"). Under the most generous reading of the

1 Complaint, plaintiff is seeking a declaration as to the viability and enforceability of the IP  
2 Agreement in various, undefined hypothetical states of facts. This poses an impossible task for the  
3 Court and an inefficient use of judicial resources.

4 **CONCLUSION**

5 For the forgoing reasons, the Complaint should be dismissed with prejudice. There is no  
6 present case or controversy that merits the Court's judicial review.

7 DATED: March 31, 2008

COBLENTZ, PATCH, DUFFY & BASS LLP

9 By: \_\_\_\_\_/s/  
10 Clifford E. Yin  
11 Attorneys for Defendants  
12 SafeDesk Solutions, Inc. and Phil Autrey  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

COBLENTZ, PATCH, DUFFY & BASS LLP  
ONE FERRY BUILDING, SUITE 200, SAN FRANCISCO, CALIFORNIA 94111-4213  
415.391.4800 • FAX 415.989.1663